

No. 61

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE
NINTH CIRCUIT.

October Term, A. D. 1892.

WALTER HINCHMAN,

Appellant,

vs.

GEORGE O. KELLY AND ANDREW C. SMITH, Executors of and Trustees under the last Will and Testament of EDWARD S. SMITH, Deceased, and MARY A. SMITH and NORTH OLYMPIA LAND COMPANY,

Appellees.

IN EQUITY.

= = RECORD = =

W. H. DOOLITTLE,
CHARLES S. FOGG,
Solicitors for Appellants.

JOHN C. STALLCUP,
BEN T. DUNNING,
PARSONS & CORELL,
Solicitors for Defendants.

FILED
AUG 30 1892



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WALTER HINCHMAN,

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GEORGE O. KELLY AND ANDREW C.
SMITH, Executors of and Trustees under
the last Will and Testament of EDWARD
S. SMITH, Deceased, and MARY A. SMITH
and NORTH OLYMPIA LAND COMPANY,

Appellees.

IN EQUITY.

*To the Honorable Judges of the Circuit Court of the
United States of America in and for the District of
Washington, Western Division:*

Walter Hinchman, of the City and County of New York and a citizen of the State of New York, brings this, his amended bill, against George O. Kelly and Andrew C. Smith, executors of and trustees under the last will and testament of Edward S. Smith, deceased, Mary A. Smith and North Olympia Land Company, citizens of the State of Washington, and each of them citizens of the State aforesaid. That the amount in

controversy in this action exceeds the sum of \$10,000, exclusive of costs, and thereupon your orator complains and says:

1.

That the Defendants, George O. Kelly and Andrew C. Smith, are the duly appointed, qualified and acting executors and trustees of and under the last will and testament of Edward S. Smith, who died on or about the 31st day of December, A. D. 1885.

2.

That the Defendant, Mary A. Smith, is the widow of the said Edward S. Smith, deceased.

3.

That at and during all of the times hereinafter mentioned the Defendant, North Olympia Land Company, was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

4.

That at and during all of the times hereinafter mentioned The Lake Superior and Puget Sound Company was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Maine, of the United States of America, and has duly filed its articles of incorporation in the office of the Secretary of State for the Territory, now State of Washington, and in all respects fully complied with all of the laws relating to foreign corporations, of the said Territory, now State of Washington.

5.

That at and during all of the times hereinafter mentioned The Whidby Land and Development Com-

pany was and now is a corporation duly organized and existing under and by virtue of the laws of the State of Washington.

6.

That on and prior to the 1st day of February, A. D. 1872, one Ira B. Thomas was invested with the full legal title to all of the lands hereinafter described and the apparent owner thereof of record. The said title held by him was derived and deraigned under a patent from the United States of America. That in truth and in fact said land was then and there owned by one Philo Osgood, and the legal title thereto, with the power of sale only, was vested in the said Ira B. Thomas in secret trust for the owner, the said Philo Osgood.

7.

That on and prior to the said 1st day of February, A. D. 1872, the said Lake Superior and Puget Sound Company, a corporation then and ever since doing business in the then Territory, now State of Washington, and engaged in the buying and selling of land and other property in said Territory and State, did, on or about the said date, and through its agent, one Edward S. Smith, in good faith and without notice of the said trust, and without notice or knowledge that the said Philo Osgood was the equitable owner of the said land, or that he had any interest therein, but believing that the same was the property of the said Ira B. Thomas, bargained, contracted for and purchased of the said Ira B. Thomas and of his wife, Sarah L. Thomas, the land hereinafter described, the legal title thereto being at all times vested as aforesaid in the said Ira B. Thomas, and he being the apparent

owner thereof, the said Lake Superior and Puget Sound Company, believing the said Ira B. Thomas to be the legal and equitable owner of the said lands, and not knowing to the contrary, but believing that he had the right to sell and convey the same. That the purchase price agreed upon for the said lands by and between the said Ira B. Thomas and Sarah L. Thomas and the said Lake Superior and Puget Sound Company, through its duly authorized agent, Edward S. Smith, was the sum of thirty-six hundred dollars (\$3,600), which said sum was by the said Lake Superior and Puget Sound Company, through its said agent, Edward S. Smith, duly paid for the said land to the said Ira B. Thomas, without any notice or knowledge of the trust, and without any notice or knowledge that the said Philo Osgood had any interest in the lands, equitable or otherwise. Said lands situate, lying and being in the County of Thurston, State of Washington, and more particularly described as follows: A divided one-fifth (1-5) interest in and to the following described lands, to-wit: Lots one, six and seven, section seventeen, and lots one, two, three, four and five, of section eighteen, and lot two of section twenty, all in township nineteen, north of range one west; and the southwest fourth of the southwest fourth, of section seven; and the west half of the southeast fourth, of section twelve; and the west half of northeast fourth, of section thirteen; and the northeast fourth of the southeast fourth, and the south half of the southeast fourth, of section twenty-four; and the north half of the northeast fourth, of section twenty-five; and the southwest fourth, of section thirty-one; and one hundred and seventy-five and one-hundredth acres of

the southern portion of the William Billings donation claim, being the same portion of the said claim as was conveyed to said first party by Calvin H. Hale by deed dated October 21, A. D. 1871, excepting twenty (20) acres on the west side of said claim conditionally conveyed to the Northern Pacific Railroad Company in sections thirty-five (35) and thirty-six (36), township nineteen, north of range two (2) west. Also all lots in First addition to North Olympia made from two hundred acres of the Putnam-Hayes donation claim in section one (1) and two (2), township eighteen (18), north of range two (2) west, conveyed to first party by William H. Avery and wife by deed dated October 20, A. D. 1871, excepting lots one (1) and twelve (12) and part of lots two (2) and eleven (11) in block eighty-eight (88) and lots one (1) and twelve (12) and part of lots two (2) and eleven (11) in block eighty-nine (89) of said addition. Also a divided one-fifth in and to three hundred and sixty acres of land now conditionally conveyed to the Northern Pacific Railroad Company, or any and all lands hereinafter received from it in exchange for the same.

8.

That the said northwest quarter of section twenty-four [24] was in said contract and agreement erroneously designated the north one-fourth of section twenty-four [24]. That the three hundred and sixty acres of land described in said contract as having been conveyed to the Northern Pacific Railroad Company, is more particularly described in said conveyance recorded in the office of the Auditor of the said county in Volume Eight of Deeds, page six hundred.

9.

That under and by virtue of the said purchase and sale, and on the first day of February, A. D. 1872, the said Ira B. Thomas made, executed and delivered and entered into an agreement in writing with the said Lake Superior and Puget Sound Company, by and through its said agent, Edward S. Smith, in which agreement Sarah L. Thomas, the wife of the said Ira B. Thomas, joined, whereby the said Ira B. Thomas and his wife sold and conveyed and agreed to sell and convey by good and sufficient warranty deed to the said Edward S. Smith the said land hereinbefore described for the consideration aforesaid, which said agreement was duly executed and acknowledged by all the parties and was filed for record and duly recorded in the office of the Auditor of Thurston County, then Territory, now State of Washington, on the 30th day of November, A. D. 1872, on pages 42, 43 and 44 of the proper records in the said office.

10.

That the said Edward S. Smith duly performed all of the conditions of the said agreement on his part to be performed.

11.

That the said Lake Superior and Puget Sound Company was the real and beneficial party in interest in said contract and furnished and paid the sum of thirty-six hundred dollars to the said Edward S. Smith which money so furnished was by him paid to the said Ira B. Thomas in payment of the said purchase price of the said land under and by virtue of said contract. That in all things touching said land and the purchase

thereof, the said Edward S. Smith acted for and as the agent of the said Lake Superior and Puget Sound Company and as its employee, he having no real or beneficial interest in said land, or contract, but said land was purchased and said contract was made in his name, for the sole use and benefit of the said Lake Superior and Puget Sound Company, and that said written agreement was entered into on the part of the said company, in the name of the said Edward S. Smith, without therein reciting the fact that the said Edward S. Smith was the agent of the said company in the purchase of the said land and that said company furnished the money to pay for the same.

12.

That the said Ira B. Thomas died on or about the 9th day of October, A. D. 1872, intestate, leaving surviving him only his wife, Sarah L. Thomas, and one heir at law, viz: Bennie Thomas, his son. That said Sarah L. Thomas and Bennie Thomas are citizens of the State of New York, and beyond the jurisdiction or process of this Court, and by reason of the facts herein stated, they have no interest whatever in the property in controversy.

13.

That thereafter the said Sarah L. Thomas was appointed and duly qualified as administratrix of the estate of the said Ira B. Thomas by the Court having probate jurisdiction in and for Herkimer County, State of New York, and thereafter one N. S. Porter, Esq., was duly appointed and qualified ancillary administrator of the estate of the said Ira B. Thomas in Washington Territory. That the estate of the said Ira B.

Thomas has been fully settled and said administrator discharged.

14.

The legal title to the land in said agreement described remained in the said Ira B. Thomas at the time of his death, he never having sold or transferred said land or any part thereof, save and except the said sale of the fifth part thereof to the said Lake Superior and Puget Sound Company, as hereinbefore stated.

15.

That the said Ira B. Thomas did not in any wise avail himself of the privileges reserved by him under the terms and conditions of the said contract to make sales and exchanges or conveyances of the said land as to him might seem proper and convenient, and it did not at any time seem to him proper and convenient to sell, exchange and convey the said land or any part thereof, but retained the whole thereof at the time of his death intact, as at the time of the execution of the said contract, save and except only the interest sold to the said Lake Superior and Puget Sound Company as aforesaid.

16.

And it is provided and stipulated in the said contract and agreement hereinbefore referred to that at any time after the full payment has been made of the purchase price of the said land that either party to the said agreement may require a division of their interest in said land and also to lay it out in town lots or such as the said Ira B. Thomas may desire to lay out into town lots. And in the case of a disagreement of either of the parties to act upon the division, each party shall

choose an arbitrator and the arbitrators thus chosen shall choose a third arbitrator and the three arbitrators shall make a decision, which shall be final and binding upon the parties to the contract, and that all land remaining unsold after the payment of the purchase price named in said contract shall, at the option of either party thereto, be divided and conveyed in the same manner as provided for dividing into town lots. Complainant avers that no sale or division was ever made of the said land or any part thereof after the said sale by the said Thomas to the said Lake Superior and Puget Sound Company. That the said Ira B. Thomas derived title to the said real estate under and by virtue of a patent from the United States of America.

17.

That the said Edward S. Smith died on or about the 31st day of December, A. D. 1885, without having conveyed said land or assigned the said agreement to the real, equitable and beneficial party in interest and owner thereof, to-wit: the Lake Superior and Puget Sound Company, but under and by virtue of said trust he delivered said contract to said company.

18.

That said Edward S. Smith died testate, devising all of his real estate and all of the estate, real and personal held in his name, to his executors and trustees, the said Defendants herein.

19.

That said executors and trustees duly qualified as such and entered upon the discharge of their duties,

and are now the acting executors and trustees of the said estate and devisees under said will.

20.

That the said Mary A. Smith is the widow of the said Edward S. Smith, has an apparent interest in all of the real estate that stood in the name of said Edward S. Smith at the time of his decease, and that the said contract apparently conveyed to the said Edward S. Smith an interest in the said lands described therein, and the said Mary A. Smith now has an apparent interest therein, but in truth and in fact the said Edward S. Smith held said land and said contract only in trust for the said Lake Superior and Puget Sound Company.

21.

That in truth and in fact the said Ira B. Thomas held the legal title to said land in trust for the said Philo Osgood, and the legal title thereto appeared of record in the name of said Ira B. Thomas and the trust relation was not disclosed. And at the time of the death of the said Ira B. Thomas the apparent legal title to the said land was vested in him, except in so far as the said title, ownership and right therein was divested by the aforesaid sale and contract.

22.

That subsequent to the death of the said Ira B. Thomas such proceedings were had in the Superior Court of New York in and for Herkimer County, in said State, wherein Philo Osgood was Plaintiff and Sarah L. Thomas, and Sarah L. Thomas as administratrix of the estate of Ira B. Thomas, deceased, and

Bennie Thomas were Defendants, as resulted in a decree declaring that Ira B. Thomas held said land and the legal title thereto in trust for Philo Osgood, and declaring and defining the trust, and decreeing that said Ira B. Thomas held the said land in controversy in said action, being the land herein described, in trust for the said Philo Osgood, and directing that the said Sarah L. Thomas as administratrix and Sarah L. Thomas and Bennie Thomas make, execute and deliver to the said Philo Osgood a quit claim deed conveying to him the land hereinbefore described. That thereafter and in pursuance of the said decree the said Sarah L. Thomas as administratrix and Sarah L. Thomas and Bennie Thomas, by his guardian, executed and delivered to said Philo Osgood a quit claim deed conveying said land to him, which deed was thereafter duly filed for record and recorded in the office of the Auditor of Thurston County, Washington.

That thereafter the said Philo Osgood, together with his wife, Emma J. Osgood, executed to Philo Remington a pretended quit claim deed to an equal undivided one-half interest in the real estate hereinbefore described, said deed bearing date of October 20, A. D. 1874, and recorded January 27, A. D. 1875, in Volume 10 of Deeds, pages 719, 720 and 721. That thereafter the said Philo Osgood, together with his wife, Emma J. Osgood, executed to Philo Remington a second pretended quit claim deed to said land, which quit claim deed was dated November 19, A. D. 1876, in Volume 11 of Deeds, page 431, in the office of the Auditor of Thurston County, Washington. That thereafter the said Philo Remington and Eliphalet Remington, co-partners doing business under the firm name of "The

Remington Agricultural Company," executed to Charles Harter a general assignment of all and singular their co-partnership and individual estate, real and personal, together with power of attorney, granting to said Harter full power and authority to do all acts and things necessary in the premises in the full extension of the said trust, including the power to execute, acknowledge and deliver all necessary deeds and instruments of conveyance, etc., said instrument dated April 22, A. D. 1886, in Volume 15 of Deeds, on pages 519, 520 and 521, in the office of the Auditor of Thurston County, Washington. That thereafter the said Philo Remington and his wife, Caroline A. Remington, and the said Charles Harter, assignee of the said Philo Remington, executed to George M. Savage an alleged quit claim deed to the various tracts and parcels of land hereinbefore described; said deed is dated October 5, A. D. 1888, and recorded on October 24, A. D. 1888, in the office of the Auditor of Thurston County, Washington, in Volume 17 of Deeds, on pages 56, 57, 58 and 59. That thereafter said George M. Savage executed to the Defendant, North Olympia Land Company, a corporation of which said Savage was then, and ever since has been, president and trustee, an alleged deed to the said land; said deed dated November 1, A. D. 1889, and recorded in the office of the Auditor of Thurston County, Washington, in Volume 18 of Deeds, on pages 701 and 707, on the 7th day of February, A. D. 1890.

That under and by virtue of the said alleged deeds and conveyances the said Defendant, North Olympia

Land Company, claims title to the said land and claims to be the owner thereof under and by virtue of the said conveyances.

24.

That on the 3rd day of January, A. D. 1891, the said Lake Superior and Puget Sound Company, for good and sufficient consideration, bargained, sold and conveyed by deed the said land hereinbefore described to the Whidby Land and Development Company, a corporation at all of the times herein referred to, duly organized and existing under and by virtue of the laws of the State of Washington, which deed was filed for record in the office of the Auditor of Thurston County, Washington on the 17th day of January, A. D. 1891, and recorded in deed records of the said county, Volume 24, page 404. That under and by virtue of the said deed the said Whidby Land and Development Company became the absolute and unqualified owner of all the land hereinbefore described.

25.

That on or about the 3d of January, A. D. 1891, the said Lake Superior and Puget Sound Company, for a good and valuable consideration, transferred and delivered to the said Whidby Land and Development Company the said contract hereinbefore referred to, and with all its right and interest in and to said contract.

26.

That in pursuance of the sale and transfer and delivery of the said contract by the said Lake Superior and Puget Sound Company to the said Whidby Land and Development Company, made, executed and

delivered to the said Whidby Land and Development Company, an assignment of the said contract and of all the right, title and interest therein.

27.

That thereafter and on or about the 20th day of November, A. D. 1891, the said Whidby Land and Development Company, for a good and sufficient consideration, bargained, sold and conveyed by deed the said land to the Complainant herein, and that under and by virtue of the said deed this Complainant became, and has ever since remained and now is, the absolute and unqualified owner of the land hereinbefore described.

28.

That on or about the 20th day of November, A. D. 1891, the said Whidby Land and Development Company, for a good and sufficient consideration, sold, transferred and delivered to this Complainant the said contract hereinbefore referred to.

29.

That in pursuance of the sale, transfer and delivery of the said contract, by the said Whidby Land and Development Company to this Complainant, the said Whidby Land and Development Company made, executed and delivered to this Complainant an assignment of the said contract and all of its right, title and interest therein.

30.

That said Philo Osgood, Philo Remington and Charles Harter, at the time of the execution of the said several conveyances to each of them, had full, complete

and actual notice and knowledge of all the matters and things in this complaint set out, and that the said Ira B. Thomas, while the apparent owner and the holder of the legal title to the said land, executed the said contract hereinbefore referred to, and thereby sold, and agreed to sell and convey, by warranty deed, a one-fifth interest in the land hereinbefore described to Edward S. Smith, and that the said Edward S. Smith took said land in trust for the said Lake Superior and Puget Sound Company, as hereinbefore stated.

31.

That the said George M. Savage, to whom said land was attempted to be conveyed by quit claim deed, by Philo Remington and his wife and Charles Harter, as assignee, as hereinbefore stated, is one of the incorporators and trustees of the Defendant North Olympia Land Company, the President of the said company, and at the time of the execution of the said deed, the said George M. Savage, as well as at the time of the execution of the said deed from the said George M. Savage to the said North Olympia Land Company, the said George M. Savage and the said company had full knowledge and notice of the existence of said contract hereinbefore referred to between the said Ira B. Thomas and said Edward S. Smith, and that thereby one-fifth of all the land had been bargained and sold to the said Edward S. Smith, and that the said Edward S. Smith held the same in trust for the said Lake Superior and Puget Sound Company. That in obtaining said deeds and purchasing said land, the said George M. Savage and the said North Olympia Land Company had notice and well knew all the matters and things in this complaint alleged, and well knew that they only acquired,

if anything, not to exceed four-fifths (4-5) interest in said land.

32.

That the said Edward S. Smith has never, at any time, accounted to the said Lake Superior and Puget Sound Company for any of his doings under and by virtue of said agreement so entered into by him as trustee of the said Lake Superior and Puget Sound Company, and has failed and neglected to assign said contract to said company, and has failed and neglected to convey said land to said company, but he died before making proper assignment and deeds. That the said Edward S. Smith never denied and at all times admitted that said money was furnished by said company and used by him as aforesaid and that he held said contract and interest in said land in trust for said company.

33.

That complainant's grantor demanded of the said George O. Kelly and Andrew C. Smith, as executors and trustees and devisees under the will of the said Edward S. Smith and of the said George O. Kelly, the duly authorized attorney in fact, and of the said Mary A. Smith, that they execute and deliver to the complainant's grantor a deed of conveyance of the said land and that they assign and transfer to complainant's grantor the said agreement so entered into by the said Edward S. Smith and vest in complainant's assignor the legal title and ownership thereof, all of which they have failed and neglected to do.

34.

That Defendant North Olympia Land Company claims to have some title, right and interest to said

land and claims and pretends to own the same under and by virtue of the conveyances hereinbefore referred to and thereby clouds and slanders complainant's right, title and interest in said land. That complainant is informed and verily believes and upon such information and belief alleges the fact to be that said land is vacant and unimproved and not in the actual possession of any one, and that Complainant has a right to the possession of the said land.

35.

For as much as your orator can have no adequate relief, except in this Court, and to the end therefore that the Defendants may, if they can, show cause why your orator should not have the relief hereby prayed, and may make a full disclosure and discovery of all of the matters aforesaid and according to the best and the utmost of their knowledge, remembrance, information and belief, true and direct answers make, to the matters hereinbefore stated and charged, but not under oath, an answer under oath being hereby expressly waived. That said Ira B. Thomas be decreed to have held said land in trust with power of sale for Philo Osgood.

That said Lake Superior and Puget Sound Company be decreed to have furnished the money to said Edward S. Smith which he paid to said Ira B. Thomas for said contract and land. That said Smith in procuring said contract and land acted as the agent and trustee of the said company. That said trust be declared. That said company be decreed to be the beneficial party in interest in said contract, and that under and by virtue of said contract it acquired an equitable interest in said land, and that this Com-

plainant is now the owner and holder of the equitable right, title and interest in said contract and land so acquired by said Lake Superior and Puget Sound Company.

That Complainant be decreed to be the absolute and unqualified owner of the land hereinbefore described, and that his title thereto may be established and quieted against each and all of the Defendants herein; and that said Defendants and each of them, and all persons claiming, or to claim, by, through or under said Defendants, or either of them, be restrained and forever enjoined from setting up or claiming any right, title or interest in and to said land or any part thereof adverse to the Complainant's interest therein, and for such other further and additional relief as may be just and equitable.

May it please your Honors to grant unto your orator, not only a right of injunction conformable to the prayer of this bill, but also a writ of subpœna of the United States of America, directed to the said George O. Kelly, Andrew C. Smith, executors and trustees under the last will and testament of Edward S. Smith, deceased, Mary A. Smith and North Olympia Land Company, commanding them on a day certain to appear and answer unto this bill of complaint, and to abide and to perform all such order and decree in the premises as the Court may deem proper and required by the process of equity and good conscience.

DOOLITTLE & FOGG,

Solicitors for Complainant and of Counsel.

Duly verified.

(*Endorsement.*)

In the Circuit Court of the United States, District of Washington, Western Division.

Walter Hinchman, Plaintiff, vs. George O. Kelly, *et al.*, Defendant. Amended Bill. Received copy of the within this 3rd day of March, 1892. John C. Stallcup, deff. North Olympia Land Co. Parsons & Corell, for Smith and Kelly. Doolittle & Fogg, Room 412 Fidelity Trust Building, Tacoma, Wash., Attorneys for Plaintiff. Filed March 3, 1892. A. Reeves Ayres, Clerk U. S. Circuit Court.

An afterwards, to-wit: on the 4th day of March, 1892, there was duly filed in said Court in said cause a demurrer to said amended bill of complaint, in the words and figures as follows, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES IN AND
FOR THE DISTRICT OF WASHINGTON, WESTERN
DIVISION.

WALTER HINCHMAN, *Complainant,* }
vs. }
NORTH OLYMPIA LAND COMPANY, }
IMPLEADED WITH GEORGE O. }
KELLY *et al.*, *Defendants.* }

The demurrer of North Olympia Land Company to the amended bill of complaint of Walter Hinchman, Complainant.

This Defendant by protestation, not confessing or acknowledging all or any of the matters and things in the said amended bill of complaint to be true in such manner and form as the same are therein and thereby set forth and alleged, doth demur thereto, and for cause

of demurrer saith: That it appears by the said Complainant's own showing by his said amended bill of complaint that the said Complainant is not entitled to the relief prayed for by his said amended bill against this Defendant.

And for further and more specific grounds of demurrer this Defendant avers as follows, to-wit:

1. That the cause of action, if any there be, arising to Complainant on account of or by reason of the several allegations and complaints in his said amended bill contained, accrued more than six years before the bill of complaint was filed, and this allegation this Defendant makes in bar of Complainant's amended bill and prays that he may have the same benefit therefrom as if he had formally pleaded the same.

2. The Complainant and his grantor acquired no right or cause of action against this Defendant by reason or virtue of the assignment of the alleged contract between Thomas and Smith, by the Lake Superior and Puget Sound Company to the Whidby Land and Development Company, or by reason of the deed from said Lake Superior and Puget Sound Company to said Whidby Land and Development Company, mentioned in said amended bill of complaint, because said Lake Superior and Puget Sound Company had no rights under said contract or in said land which it could transfer by assignment or deed.

3. The claim of Complainant against this Defendant and to the premises in question, is stale and should not be countenanced by a Court of equity, and the Complainant fails to show any reason for the long delay in

asserting his pretended rights, and it would now be inequitable and unjust that the Complainant should be permitted to have anything by reason of the said pretended agreement of which he alleges possession, after the long lapse of time and the death of all the parties to the transaction.

Wherefore, and for divers other good causes of demurrer appearing on the said amended bill, this Defendant doth demur thereto. And he prays the judgment of this Honorable Court whether he shall be compelled to make any answer to the said amended bill, and he humbly prays to be hence dismissed with his reasonable costs in this behalf sustained.

EBEN T. DUNNING,
JOHN C. STALLCUP,
Solicitors and of Counsel for Defendant North
Olympia Land Co.

I hereby certify that the foregoing demurrer is in my opinion well founded in point of law.

JOHN C. STALLCUP,
EBEN T. DUNNING,
Of Counsel for Defendant, North Olympia Land
Company.

STATE OF WASHINGTON, }
County of Thurston. } ss.

Geo. M. Savage, being duly sworn, says: I am President of the Defendant North Olympia Land Company, Defendant above named. The foregoing demurrer is not interposed for delay.

GEORGE M. SAVAGE.

Subscribed and sworn to before me this 4th day of
March, 1892.

(Seal.)

A. W. WINSOR,
Notary Public Residing at Olympia,
Thurston County, Washington.

(*Endorsement.*)

Circuit Court, District of Washington. Walter Hinchman, Complainant, vs. North Olympia Land Co. Impleaded with Geo. O. Kelly *et al.*, Defendants. Demurrer to amended complaint. Filed March 4th, 1892. A. Reeves Ayres, Clerk. E. T. Dunning, Tacoma, Washington.

And, afterwards, to-wit: on the 4th day of April, 1892, there was duly filed in said Court in said cause a demurrer to the amended bill of complaint in the words and figures as follows, to-wit:

IN THE CIRCUIT COURT OF THE UNITED STATES, NINTH
JUDICIAL CIRCUIT, DISTRICT OF WASHINGTON.

WALTER HINCHMAN,	<i>Claimant,</i>	}
<i>vs.</i>		
GEORGE O. KELLY and ANDREW C. C. SMITH, Executors of the last will and testament of Edward S. Smith, deceased, MARY A. SMITH and the NORTH OLYMPIA LAND COMPANY,	<i>Respondents.</i>	}

DEMURRER.

Now comes the Respondents, George O. Kelly and Andrew C. Smith, executors of the last will and testament of Edward S. Smith, deceased, and Mary A. Smith, and severally and separately demur to said bill of complaint, and for cause of demurrer say the same does not state facts sufficient to constitute a cause of action against these Respondents, or to entitle Claimant to the relief demanded.

PARSONS & CORELL,
Solicitors for Respondents.

STATE OF WASHINGTON, }
County of Pierce. } ss.

George O. Kelly, of the City of Tacoma, in said state and district, being duly sworn, says, he is one of the Respondents above named, and that the demurrer herein is not interposed for delay.

GEO. O. KELLY.

Sworn to and subscribed before me this 12th day of April, 1892. HARRIS A. CORELL,
Notary Public in and for the State of Washington,
Residing at Tacoma.

I hereby certify that in my opinion the foregoing demurrer is well founded in point of law.

Dated April 12, 1892.

GALUSHA PARSONS,
Of Counsel for Above Named Respondents.

(*Endorsement.*)

In the Circuit Court of the United States, Ninth Judicial Circuit, District of Washington. Walter Hinchman vs. Geo. O. Kelly *et al.* Demurrer. Filed April 14, 1892. A. Reeves Ayres, Clerk.

And afterward, to-wit: on Wednesday, the 4th day of May, 1892, the same being the twenty-fourth judicial day of the regular February term of said Court, present the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

UNITED STATES CIRCUIT COURT, DISTRICT OF WASHINGTON, WESTERN DIVISION.

WALTER HINCHMAN, *Complainant,* }
 vs. }
GEORGE O. KELLY, ANDREW C. SMITH, }
 executors of and trustees under }
 the last will and testament of } No.
 Edward S. Smith, deceased, }
 MARY A. SMITH and NORTH }
 OLYMPIA LAND COMPANY, }
 Defendants. }

Now on this 4th day of May, A. D. 1892, this cause came on regularly for hearing upon the several demurrers of the Defendants to the amended complaint on file herein; the same was argued by counsel for the respective parties, and the Court being fully advised in the premises, announced its decision as follows:

Ordered, That the several demurrers of the Defendants to the amended bill of complaint herein, be, and the same are hereby sustained.

To the making of which order the Complainant then and there duly excepted, and his exceptions are by the Court allowed, and the Complainant having elected to abide by his said amended bill of complaint and declining to plead further, and the Court being fully advised in the premises,

It is ordered, adjudged and decreed, that the amended bill of complaint of the Complainant, Walter Hinchman, be, and the same is hereby dismissed, and that the Defendants, George O. Kelly, Andrew C. Smith, executors of and trustees under the last will and testament of Edward S. Smith, deceased, Mary A.

Smith and North Olympia Land Company, do have and recover of and from the said Complainant, Walter Hinchman, their costs in this suit incurred, taxed at.....Dollars.

To the making of which decree, the Complainant, by his solicitors, in open Court, at the time, duly excepted, and their exceptions are by the Court allowed.

Dated May 4th, A. D. 1892.

C. H. HANFORD, Judge.

(*Endorsement.*)

In the Circuit Court of the United States, District of Washington, Western Division. Walter Hinchman, Plaintiff, vs. George O. Kelly *et al.*, Defendants. Judgment. A. Reeves Ayres, Clerk. By R. M. Hopkins, Deputy. Doolittle & Fogg, Room 616 Fidelity Trust Building, Tacoma, Washington, Attorneys for Plaintiff. Entered in Decrees A 103.

And afterward, to-wit: on the 4th day of May, 1892, there was duly filed in said Court in said cause a petition for appeal and order allowing same, in the words and figures as follows, to-wit:

UNITED STATES CIRCUIT COURT, DISTRICT OF WASHINGTON, WESTERN DIVISION.

WALTER HINCHMAN,	<i>Plaintiff,</i>	}
<i>vs.</i>		
GEORGE O. KELLY, ANDREW C. SMITH,		}
executors of and trustees under		
the last will and testament of		
Edward S. Smith, deceased,		
MARY A. SMITH and NORTH		
OLYMPIA LAND COMPANY,		
	<i>Defendants.</i>	

To the Honorable, the District Judge of the United States Circuit Court for the District of Washington, holding the Circuit Court of the Ninth Circuit, in and for said District:

Your petitioner, the Plaintiff, Complainant in the above entitled cause, would respectfully represent and show that in the above entitled cause, pending in the United States Circuit Court in and for the District of Washington, Western Division, there was entered at the May term, A. D. 1892, of said court, and on the 4th day of May, A. D. 1892, a final decree, greatly to the prejudice and injury of your petitioner, which said decree is erroneous and inequitable in many particulars.

Wherefore, in order that your petitioner may obtain relief in the premises and have an opportunity to show the errors complained of, you petitioner prays that he may be allowed an appeal in said cause to the Honorable United States Circuit Court of Appeals for the Ninth Circuit, and that the proper orders therefor and touching the security required of him be made.

DOOLITTLE & FOGG,
Solicitors for Petitioners.

ORDER.

Upon hearing and filing the foregoing petition, and it appearing to the Court to be a proper cause for the allowance of an appeal, IT IS ORDERED that the prayer of the petitioner be granted and said appeal be and the same is hereby allowed, and that the Complainant enter said security on appeal, as required by law, in the sum of five hundred dollars.

Dated this 4th day of May, A. D. 1892.

C. H. HANFORD, Judge.

(*Endorsement.*)

In the Circuit Court of the United States, District of Washington, Western Division. Walter Hinchman, Plaintiff, vs. George O. Kelly, *et al.*, Defendants. Petition for appeal. Filed May 4, 1892, A. Reeves Ayres, Clerk, by R. M. Hopkins, Deputy.

And afterwards, to-wit: on the 4th day of May, 1892, there was duly filed in said Court in said cause an assignment of errors, in the words and figures as follows, to-wit:

UNITED STATES CIRCUIT COURT, DISTRICT OF WASHINGTON, WESTERN DIVISION.

WALTER HINCHMAN, *Complainant*
and Appellant,

vs.

GEORGE O. KELLY AND ANDREW C. SMITH, Executors of and Trustees Under the Last Will and Testament of Edward S. Smith, Deceased, MARY A. SMITH AND NORTH OLYMPIA LAND CO.

Defendants and Appellees.

ASSIGNMENT OF ERRORS.

Now comes the Appellant, by his Solicitors, and assigns the following errors:

1.

The Court erred in sustaining the demurrer of the Appellees to the amended bill of complaint.

2.

The Court erred in making the decree, dismissing the amended bill of complaint.

DOOLITTLE & FOGG,
Solicitors for Appellant.

(Endorsement.)

In the Circuit Court of the United States, District of Washington. Walter Hinchman, Plaintiff, vs. George O. Kelly *et al.*, Defendants. Assignment of Errors. Filed May 4, 1892. A. Reeves Ayres, Clerk, by R. M. Hopkins, Deputy.

And, afterward, to-wit: On the 13th day of May, 1892, there was duly filed in said Court in said cause a bond on appeal in the words and figures as follows, to-wit:

UNITED STATES CIRCUIT COURT DISTRICT OF WASHINGTON, WESTERN DIVISION.

WALTER HINCHMAN,	<i>Appellant,</i>	}
vs.		
GEORGE O. KELLY AND ANDREW C. SMITH, Executors of and Trustees Under the Last Will and Testament of Edward S. Smith, Deceased, MARY A. SMITH AND NORTH OLYMPIA LAND CO.		}
	<i>Appellees.</i>	

Know All Men by These Presents: That we, W. A. Potter, of Skagit County, State of Washington, and F. I. Mead, of Pierce County, State of Washington, are held and firmly bound unto George O. Kelly, Andrew C. Smith, executors and trustees under the last will and testament of Edward S. Smith, deceased, Mary A. Smith and North Olympia Land Company, in the sum of five hundred dollars, to be paid to the said George O. Kelly, Andrew C. Smith, executors of and trustees under the last will and testament of Edward S. Smith, deceased, Mary A. Smith and North Olympia Land Company, their successors, executors and adminis-

tors, to which payment well and truly to be made we bind ourselves, our and each of our heirs, executors, administrators and assigns, jointly and severally, firmly by these presents.

Sealed with our seals and dated this 4th day of May, A. D. 1892.

Whereas, The above named Walter Hinchman has taken an appeal to the United States Circuit Court of Appeal for the Ninth Circuit to reverse the decree rendered in the above entitled suit by the United States Circuit Court for the District of Washington, Western Division, and the undersigned are desirous of giving security on said appeal in the prosecution thereof and for costs.

Now, therefore, The condition of this obligation is such that if the above named Walter Hinchman shall prosecute said appeal to effect and answer said costs, if he shall fail to make good said appeal, then this obligation is to be void, otherwise to remain in full force and virtue.

W. A. POTTER, [Seal.]

F. I. MEAD, [Seal.]

Signed, sealed and delivered in the presence of
CHARLES S. FOGG,
M. H. PALMER.

STATE OF WASHINGTON, }
County of Pierce. } ss.

W. A. Potter and F. I. Mead, being each severally duly sworn, say, each for himself: That he is a resident of the State of Washington; that he is not an attorney or counselor at law, clerk, sheriff, marshal or other

officer of any Court; that he is worth the sum of five hundred dollars, over and above all just debts and liabilities, exclusive of property exempt from execution.

W. A. POTTER,

F. I. MEAD.

Subscribed and sworn to before me this 4th day of May, A. D. 1892.

CHARLES S. FOGG,

[Seal.] Notary Public in and for the State of Washington, Residing at the City of Tacoma, in said State.

ORDER.

The above bond presented to me this 11th day of May, 1892, and the same is hereby approved.

C. H. HANFORD, Judge.

(*Endorsement.*)

No. 110. In the Circuit Court of the United States, District of Washington, Western Division. Walter Hinchman, Plaintiff, vs. George O. Kelly *et al.*, Defendants. Bond. Filed May 13, 1892. A. Reeves Ayres, Clerk.

And afterward, to-wit: on Wednesday, the 11th day of May, 1892, the same being the twenty-fifth judicial day of the regular February term of said Court, present the Honorable Cornelius H. Hanford, United States District Judge, presiding, the following proceedings were had in said cause, to-wit:

UNITED STATES CIRCUIT COURT DISTRICT OF WASHINGTON,
WESTERN DIVISION.

WALTER HINCHMAN, *Appellant,* }
vs. }
GEORGE O. KELLY AND ANDREW C. SMITH, Executors of and Trustees Under the Last Will and Testament of Edward S. Smith, Deceased, MARY A. SMITH AND NORTH OLYMPIA LAND CO. } Order.
Appellees. }

And now, on this 11th day of May, A. D. 1892, came the complainant, by his solicitors, W. H. Doolittle and Charles S. Fogg, in open Court and pray the Court to grant an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, in the State of California, on the first Monday in October, A. D. 1892, and to fix the security thereon. The Court being fully advised in the premises, said security was fixed in the sum of Five Hundred Dollars, and thereupon the Complainant presented his security in the aforesaid sum to the Judge of this Court (the bond being executed with W. A. Potter and F. I. Mead as sureties) and the same was by him approved and appeal allowed. The time for filing and approval of said security and bond having heretofore been duly extended to this day.

Thereupon Complainant presented his assignment of errors, which were filed in this cause on the 4th day of May, A. D. 1892, and duly approved.

C. H. HANFORD, Judge.

(*Endorsement.*)

No. 110. In the Circuit Court of the United States, District of Washington, Western Division. Walter Hinchman, Plaintiff, vs. George O. Kelly, *et al.*, Defendants. Order approving bond, etc. Filed May 13, 1892. A. Reeves Ayres, Clerk.

CERTIFICATE OF TRANSCRIPT.

UNITED STATES OF AMERICA, }
District of Washington, } ss.
Western Division. }

I, A. Reeves Ayres, Clerk of the Circuit Court of the United States for the District of Washington, do hereby certify the writings hereto attached to be a true transcript of the record and proceedings in case No. 110 of Walter Hinchman, Plaintiff, vs. George O. Kelly and Andrew C. Smith, executors of and trustees under the last will and testament of Edward S. Smith, deceased, and Mary A. Smith and North Olympia Land Company, Defendants, as the same remain on file and of record in my office.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the said Court at my office in the City of Tacoma, [Seal.] in said District, this, the 4th day of June, in the year of our Lord, one thousand eight hundred and ninety-two.

A. REEVES AYRES,
Clerk of said Court.

UNITED STATES OF AMERICA, SS.

THE PRESIDENT OF THE UNITED STATES OF AMERICA,
*To the Honorable, the Judges of the Circuit Court of the
United States, for the District of Washington, Wes-
tern Division,*

GREETING: Because in the record and proceed-
ing, and also in the rendition of the judgment of a plea
which is in the said Circuit Court, before you between
Walter Hinchman, Plaintiff, and George O. Kelly and
Andrew C. Smith, executors of and trustees under the
last will and testament of Edward S. Smith, deceased,
and Mary A. Smith and North Olympia Land Com-
pany, Defendants, a manifest error hath happened, to
the great damage of the said Defendants, as by their
complaint appears, and it being fit that the error, if
any there hath been, should be duly corrected, and full
and speedy justice done to the parties aforesaid in this
behalf, you are hereby commanded, if judgment be
therein given, that then, under your seal, distinctly
and openly, you send the record and proceedings afore-
said, with all things concerning the same, to the
United States Circuit Court of Appeals for the Ninth
Circuit, together with this writ, so that you have the
same at San Francisco, in the State of California, on
the first Monday of October next, in the said United
States Circuit Court of Appeals, to be there and then
held, that the record and proceedings aforesaid be in-
spected, the said United States Circuit Court of Appeals
may cause further to be done therein to correct that
error, what of right and according to the law and
custom of the United States should be done.

Witness: The Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this, 4th day of May, (Seal.) in the year of our Lord, one thousand eight hundred and ninety-two, and of the Independence of the United States, the one hundred and sixteenth.

The above writ of error is hereby allowed.

A. REEVES AYRES,
Clerk of United States Circuit Court, District of
Washington.